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DIGITAL REPLICAS OF CELEBRITIES: COPYRIGHT, TRADEMARK, AND RIGHT OF PUBLICITY ISSUES

Joseph J. Beard*

What do Albert Einstein and the Three Stooges have in common? Endorsements! Dead though they may be, Einstein, the Stooges, and a celestial host of other deceased celebrities have, for years, endorsed a variety of products and services through print ads in newspapers and magazines. Beginning in the 1990s, digital technology has brought dead celebrities back to life for television ads: Cagney, Bogart, and Grant (Cary not Hugh) endorsed Diet Coke; Monroe cooed over Chanel No. 5; the Duke sprang into action for Coors Beer; Astaire danced with a Dirt Devil; and Elvis gyrated in a Pizza Hut. Some dead celebrities even appeared in contemporary television and motion pictures: Publisher William Randolph Hearst with Woody Allen in *Zelig*, JFK, LBJ, and Nixon with *Forrest Gump*; Bogart with Bergman's daughter in a *Tales From the Crypt* episode, and Brooke Shields romanced by Errol Flynn's Robin Hood character in an episode of *Suddenly Susan*—all thanks to digital technology.

Computer technology has also brought us digital doppelgangers of living actors: the pseudo-pod that mimicked Mary Elizabeth's Mastrantonio's face in *The Abyss*, the liquid metal cyborg counterpart to actor Robert Patrick in *Terminator Two*, as well as the digital clones of Stallone in *Judge Dredd* and Denzel Washington in *Virtuosity*, to name but a few.

Digital technology is also giving us totally imaginary people such as the Baby Cha Cha character of Ally McBeal fame; Kyoko Date, the virtual Japanese pop star; and most recently Annova, a computer-generated anchor for Britain's Press Association's interactive service division.

With technology comes temptation—the temptation to exploit digital persona without permission. *Virtual* humans need *real* protection against involuntary servitude. Copyright, trademark, right of publicity, and unfair competition laws provide a bulwark against unauthorized exploitation. In addition, where appropriate, privacy, false light, and libel laws may provide additional protection.

Copyright does not protect the way a person looks or talks, but copyright does protect photographs, motion pictures, and sound

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recordings that capture the image and/or voice of an individual. One who, without permission, uses a copyright-protected photograph, motion picture or sound recording to create a digital replica of a deceased celebrity, such as was done with Cagney, Bogart, the Duke, etc., violates the ownership rights of the copyright holder, unless fair use applies. The same is true of one who extracts images of such a person from archival works for insertion into contemporary works. One who duplicates, without permission, an already existing authorized digital replica, such as the Cyberware scans of Stallone, Denzel Washington, etc., violates the copyright in such data sets. Where images or data are in the public domain, such unauthorized copying is permissible as a matter of copyright law; however, trademark and/or right of publicity law *may* provide a bar to such exploitation, the public domain status of the copied material notwithstanding.

If a celebrity has established trademark status as to name, image, or voice, trademark laws may provide protection, at least as to advertising or trade purpose use, as was the case with sound-a-likes of Bette Midler and Tom Waits and look-a-likes of Vanna White and Woody Allen. And, whether trademark protection is available or not, right of publicity laws may apply.

Right of publicity laws vary from jurisdiction to jurisdiction but, in general, provide protection for living celebrities against unauthorized uses for advertising or trade purposes. Right of publicity protection for deceased celebrities varies from state to state and country to country, ranging from no protection at all to perpetual protection. Where post mortem protection is in force, the statutes typically protect against unauthorized advertising and trade purposes. Where an unauthorized exploitation involves advertising or trade purposes, such as T-shirts bearing the image of the celebrity, the phalanx of copyright, trademark, and right of publicity laws provide appropriate remedies—including injunctive relief. However, there is a potential conflict over the right to control exploitation of persona and the First Amendment right of others to employ that very same persona in works of expression. The California legislature wrestled with this issue in 1999 in amending its post mortem right of publicity statute. As finally enacted, the statute appears to favor First Amendment concerns.

The film *Contact* provides an example of the tensions between a person's rights in his or her persona and the First Amendment rights of a storyteller. President Clinton appeared involuntarily in the film *Contact*. Director Robert Zemeckis digitally extracted images of the President from existing news footage and inserted the President into

scenes in the film. The President was apparently displeased with his acting debut on the big screen. Had the President—who is too politically savvy to do so—sought to enjoin distribution of the film, at least with his image in it, he would have had an array of possible legal theories to explore: right of privacy, right of publicity, Lanham Act section 43(a), unfair competition, libel, and false light. Although with respect to *Contact*, false light and section 43(a) would appear to have been the most appropriate theories for the President to have invoked, right of privacy, publicity, etc., might prove appropriate on a different set of facts.

Eventually, virtual human technology will provide totally autonomous digital replicas of living and deceased celebrities. In the meantime, digital technology has already provided the means to repurpose existing filmed images of an actor or other celebrity. Where to draw the line between the rights of the person in his or her persona and the First Amendment rights of a storyteller to employ that persona without permission is likely to provide grist for the judicial mills for years to come. To borrow from Lord Macaulay's oft-quoted remark about copyright, the right of a person in his or her persona versus the First Amendment right of another to exploit that persona is a question that "is neither black nor white, but gray."¹

1. LORD MACAULAY, *SPEECHES ON POLITICS AND LITERATURE* 178 (2d prtg. 1917) (from a speech delivered before the House of Commons, 1841).

